No. 9480.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANCIS A. HOWARD,

Appellant,

vs.

E. H. ANGIER, THE HOWARD VAUGHAN CO., INC., a corporation; HOWARD F. ZAHAU, also known as FRANCIS Z. HOWARD; JAMES H. MOYER, MARY M. VAUGHAN, JAMES WESTERVELT, CHARLES S. MACKENZIE, THOMAS MORLEY, JR., JAMES I. BOWERS, M. J. CRONIN and CHARLES LEVY,

Appellees.

BRIEF OF APPELLANT.

CALVIN S. MALE,
Solicitor for Appellant.

PARKER & BAIRD COMPANY, LAW PRINTERS, LOS ANGELES.

TOPICAL INDEX.

PAGE

TEXTBOOKS.

No. 9480.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRANCIS A. HOWARD,

Appellant,

vs.

E. H. ARCHER, THE HOWARD-VAUGHAN CO., INC., a corporation; HOWARD F. ZAHNO, also known as FRANCIS Z. HOWARD; JAMES H. MOYER, MARY M. VAUGHAN, JAMES WESTERVELT, CHARLES S. MACKENZIE, THOMAS MIDGLEY, JR., JAMES I. BOWERS, M. J. CRONIN and CHARLES LEVY,

Appellees.

BRIEF OF APPELLANT.

Statement of the Case.

This is an appeal from the judgment and decree of the District Court of the United States for the Southern District of California, Central Division, in the above entitled matter, dismissing bill of complaint in equity, upon pleadings filed by appellees, and upon judgment of dismissal and denial of leave to amend bill of complaint by said court.

I.

The bill of complaint in equity for invalidation of patent, invalidation of unconstitutional contracts, conspiracy and fraud, etc. [Tr. of Record, p. 2], shows that the defendants (appellees) and fictitious named defendants as set forth in said bill of complaint in equity [Tr. of Record, p. 3, par. II] are made defendants in the above entitled matter upon grounds as set forth in the bill of complaint in the record hereof.

II.

The bill of complaint in equity further shows that the jurisdiction of said complaint in equity in above entitled matter, is based upon irreparable injuries, losses and damages in excess of and over three thousand ($3,000.00) dollars over and above all costs and attorney fees and that a federal question is involved in the matter of a patent and all rights in connection thereto, belonging to complainant, wherein said complainant has been unlawfully deprived of said rights in violation of constitutional, patent and federal law rights as set forth in bill of complaint in equity [Tr. of Record, p. 4, par. III].

III.

Appellant further shows that during the year of 1915 and also in 1916, that appellant discovered that tetraethyl lead when mixed in small quantities with any grade of gasoline, increased the efficiency of such gasoline when used as fuel for internal combustion engines and eliminated the knock in the motor and minimized the accumulation of carbon in the cylinders of the motor which occurred in the use of gasoline not so treated, also further discovered that tetraethyl lead when mixed with other certain other chemicals or reagents in relatively certain

quantities and under relatively certain quantities and conditions made a safe, efficient and very low priced chemical compound, which, when added to any grade of gasoline, increased the efficiency when used as fuel for internal combuston engines, eliminated the knock in the motor and minimized the accumulation of carbon in the cylinders which attended the use as motor fuel of gasoline not so treated [Tr. of Record, p. 5, par. V].

IV.

The record further shows, that the aforesaid complainant Francis A. Howard wrote out a formula in conformity with his aforesaid discoveries and inventions, and that in addition to the said discovery and invention of the use of tetraethyl lead, said complainant (appellant) also discovered the chief active ingredient and reagent employed in accomplishing the beneficial results as recited herein, and said formula contained several other ingredients and reagents, some of which were for the purpose of preventing precipitation, enabling the tetraethyl lead to act more efficiently and to bring about other beneficial results; some of which were intended to give to low grade gasolines an increased explosive force, a distinctive color and some of the ingredients for concealing the presence in said mixture of tetraethyl lead without interfering with the effectiveness thereof and to render impossible a complete analysis of said mixture of chemical compounds composing said formula and to prevent anyone from ascertaining by an analysis that the said mixture contained tetraethyl lead [Tr. of Record, pp. 5-6, par. VI].

V.

The record further shows that the aforesaid complainant (appellant) Francis A. Howard discovered and in-

vented a process and method of mixing aforesaid chemical combination, which made said discovery and invention safe to handle and aided the assimilation of the tetraethyl lead by the gasoline with which it was blended, and the formula of said discovery and invention was a secret formula and the chemical compound of said formula was given the name of "Vitigas" and under said name was manufactured and sold by appellant for several years thereafter, after the discovery and invention by appellant hereof [Tr. of Record, p. 6, par. VII].

VI.

The record further shows that on or about November 4, 1916, an application for registration of a trademark covering the use of "Vitigas" was filed in the United States Patent Office, and that on April 24, 1917, that the said trademark for use of "Vitigas" was registered in said United States Patent Office, and that on November 25, 1916, an application for registration in United States Patent Office for a label entitled "GARAGE VITIGAS" a chemical compound for use in blending gasoline, and that said application for registration was granted by the said United States Patent Office was granted and registration issued February 13, 1917, and said trademark "Vitigas and Garage Vitigas" was duly published as required by law [Tr. of Record, p. 7, par. VIII].

VII.

The record further shows that appellant Francis A. Howard, on January 25, 1918, filed an application in the United States Patent Office for Letters Patent of the United States for a "Process for the Extraction of Gasoline and Another Product from Kerosene," and that on November 12, 1918, Letters Patent was issued by said

Patent Office containing four claims [Tr. of Record, p. 8, par. IX] providing a means for recovering certain hydrocarbon distillates which were used as reagents in conjunction with, and to further and expedite the assimilation of certain other ingredients and reagents and lead compounds which composed the aforesaid secret formula for "Vitigas."

VIII.

The record shows that the defendant (appellee) Thomas Midgley, Jr., fraudulently, wrongfully and unlawfully filed numerous applications for patents, which were supported by perjury and fraud, in the defrauding appellant of his property, property rights and constitutional rights without jurisdiction and without due process of law [Tr. of Record, pp. 8, 9, 10 and 11, par. X], and by gaining entrance to appellant's laboratory, deliberately stole the discoveries and inventions of appellant.

IX.

The record further shows that on or about January 15, 1938, a conspiracy was entered into and has since continued to defraud appellant of his property and property rights without due process of law [Tr. of Record, p. 11, par. XI].

X.

The record further shows that several of the appellees conspired in a conspiracy to further defraud appellant of his property and property rights in violation rights as provided by the Constitution of the United States to appellant as an inventor in the discovery of scientific and useful arts, and as provided under the citizenship rights of appellant as an American citizens of the United States of America [Tr. of Record, pp. 11-12, par. XII], on various dates from December 15, 1937, to February, 1939.

XI.

The record shows, that on or about December 15, 1937, certain appellees, as set forth in the record, entered into a further conspiracy to defraud appellant of his property and property rights without jurisdiction and without due process of law, by purporting to hold meetings which were fraudulent [Tr. of Record, pp. 12-13, par. XIII].

XII.

The record further shows, that on or about December 28, 1937, that appellees as set forth in record, held fraudulent meetings for the purpose of adopting a contract obtained by fraud, thereby to deprive appellant of his property and property rights through and by the use of conspiracy and fraud [Tr. of Record, pp. 14-15, par. XIV].

XIII.

That on or about January 10, 1938, certain appellees as set forth in record, procured by conspiracy and fraud, certain personal property of appellant, and now hold in their possession said personal property, belonging to appellant, and said appellees have procured and are holding said personal property, thereby are depriving appellant of his property and property rights, without jurisdiction and without due process of law [Tr. of Record, pp. 15-16, par. XV].

XIV.

That on or about February 4, 1938, certain appellees held a meeting fraudulently for the purpose to defraud appellant of his property and property rights without jurisdiction and without due process of law [Tr. of Record, pp. 16-17, par. XVI].

XV.

That on or about February 17, 1938, that certain appellees as set forth in the record entered into a conspiracy to defraud appellant of his property and property rights against the provisions granted by the Constitution of the United States of America, wherein appellant has the right to promote the progress of science and useful arts, by securing to complainant (appellant) for limited times, and to authors and inventors the exclusive right to their respective writings and discoveries, and the said conspiracy and fraud deprives appellant of said rights without due process of law [Tr. of Record, pp. 17-18, par. XVII].

XVI.

That on or about March 16, 1938, appellees as set forth in record, further entered into a conspiracy to defraud appellant by fraudulently appointing trustees in a trust agreement for the purpose to fraudulently, illegally and unconstitutionally confiscate personal property and property rights of appellant, consisting of documents and corporation stock, and said confiscation was fraudulently executed, without jurisdiction and without due process of law [Tr. of Record, pp. 18-19, par. XVIII].

XVII.

That on or about March 16, 1938, appellees as set forth in record, further entered into a conspiracy to defraud appellant by holding fraudulent meetings for the purpose to defraud appellant of his property and property rights [Tr. of Record, p. 20, par. XIX].

XVIII.

That on or about February 25, 1939, appellees as set forth in record entered into a contract which is founded

upon the conspiracy and fraud set forth herein, for furthering the purpose to defraud appellant of his property and property rights without jurisdiction and without due process of law [Tr. of Record, pp. 20-21, par. XX].

XIX.

That on or about the 4th day of March, 1939, appellees as set forth in record, a certain contract was made and entered into fraudulently for the purpose to defraud appellant of his property and property rights without jurisdiction and without due process of law [Tr. of Record, pp. 21-22, par. XXI].

XX.

That on or about February 25, 1939, that a trust agreement was entered into and made upon the foundation of fraud, by certain appellees as set forth in the record, and through said trust agreement appellant was unconstitutionally deprived of his property and property rights without jurisdiction and without due process of law [Tr. of Record, pp. 22-23-24, par. XXII].

XXI.

That on or about the month of June, 1938, certain appellees as set forth in the record, filed an action in the Chancery Court of New Jersey, under the title of The Howard-Vaughan Co., Inc., a corporation, against various defendants, which said action is founded upon conspiracy and fraud, and said action is to further unconstitutionally confiscate the property and property rights of appellant without jurisdiction and without due process of law [Tr. of Record, pp. 25-26, par. XXIV].

XXII.

That the aforesaid appellees have caused irreparable injuries, losses and damages to appellant and threaten further irreparable injuries, losses and damages, through which it would be doubtful if any recovery could be made from the discoveries and inventions of appellant and thereby the property and property rights of appellant as an inventor and discoverer of useful and scientific arts would be unconstitutionally destroyed without jurisdiction and without due process of law [Tr. of Record, p. 26, par. XXV].

XXIII.

That on or about October 6th, 1934, the directors of The Howard-Vaughan Co., Inc., a corporation, held a meeting and passed a resolution, wherein the secret formula of appellant was assigned to said corporation and said assignment was accepted by said corporation upon certain conditions, which said conditions was not carried out by said corporation, and said resolution was made with the understanding that if the said conditions were not carried out that the said secret formula would be reassigned back to appellant, but instead of so doing, the said corporation has at all times and does now refuse to reassign said secret formula back to appellant [Tr. of Record, pp. 27-28, par. XXVI] and thereby the appellees as set forth in the record have through conspiracy and fraud deprived appellant of his property and property rights without jurisdiction and without due process of law, and the said unconstitutional confiscation of said secret formula, is the basis and foundation of the aforesaid action filed in the Chancery Court of New Jersey, which is a violation of the rights granted to appellant as an inventor and discoverer under the constitutional pro-

visions of the United States of America and the Federal Laws of the United States [Tr. of Record, pp. 27-28, par. XXVI].

XXIV.

Appellant prayed for judgment as set forth in the record which was denied by the court below [Tr. of Record, pp. 28-29-30].

XXV.

That on December 30, 1939, the defendants (appellees) E. H. Archer, The Howard-Vaughan Co., Inc., and James Westervelt, filed an answer to aforesaid bill of complaint in equity [Tr. of Record, pp. 31-44].

XXVI.

That on January 5, 1940, aforesaid appellees, E. H. Archer, The Howard-Vaughan Co., Inc., and James Westervelt, filed a notice of motion for judgment on the pleadings, supported by authorities, which are not applicable to the entitled cause and action [Tr. of Record, pp. 45-46].

XXVII.

That on January 5, 1940, appellees, E. H. Archer, The Howard-Vaughan Co., Inc., and James Westervelt, filed a copy of, on bill, etc., order dismissing bill of complaint, in Chancery of New Jersey, 120-704, which said copy is not certified [Tr. of Record, pp. 48-52].

XXVIII.

That on January 9, 1940, appellant filed notice of motion and petition to amend, and motion to amend and petition to amend bill of complaint in equity [Tr. of Record, pp. 52-53].

XXIX.

That on January 9, 1940, appellant filed motion to amend bill of complaint in equity [Tr. of Record, pp. 53-54].

XXX.

That on January 9, 1940, appellant filed petition to amend bill of complaint in equity for invalidation of patent, invalidation of unconstitutional contracts, conspiracy and fraud, etc. [Tr. of Record, pp. 54-61].

XXXI.

That on January 9, 1940, appellant filed notice of motion & motion to deny and dismiss motion for security for costs and motion for judgment on the pleadings for defendants making said motions [Tr. of Record, p. 62].

XXXII.

That on January 9, 1940, appellant filed motion to deny and dismiss motion for security for costs and motion for judgment on the pleadings for defendants making said motions [Tr. of Record, p. 63].

XXXIII.

That on January 15, 1940, the District Court, the Honorable Leon R. Yankwich, sitting as District Judge, made a minute order, as set forth in the record [Tr. of Record, pp. 63-65].

XXXIV.

That on January 17, 1940, judgment of dismissal, entered, docketed and filed by the Honorable Leon R. Yankwich, Judge of the District Court below [Tr. of Record, pp. 66-68].

XXXV.

That on February 15, 1940, appellant filed and served, Notice of Appeal to United States Circuit Court of Appeals, Ninth Circuit [Tr. of Record, p. 69].

XXXVI.

That on March 13, 1940, appellant filed assignment of errors [Tr. of Record, pp. 70-72].

XXXVII.

That on March 23, 1940, clerk of the District Court below, certified the record of the District Court below on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, and also further certified that the fees of the clerk for comparing, correcting and certifying the foregoing record were paid by the appellant herein [Tr. of Record, pp. 72-73].

XXXVIII.

That on March 25, 1940, appellant filed statement of points [Tr. of Record, pp. 74-76].

XXXIX.

That on March 25, 1940, appellant filed designation of record on appeal [Tr. of Record, pp. 76-77].

XL.

That on March 25, 1940, solicitor for appellant filed affidavit of service by mail [Tr. of Record, pp. 77-78].

The foregoing statement of the case being set forth for the purpose of reversal upon appeal hereof from the aforesaid judgment of the District Court of the United States for the Southern District of California, Central Division, to the United States Circuit Court of Appeals for the Ninth Circuit.

ARGUMENT.

POINTS AND AUTHORITIES.

Copyright Property and Property Rights Shown in Record.

On October 30, 1939, appellant filed a bill of complaint in equity for invalidation of patent, invalidation of unconstitutional contracts, conspiracy and fraud, etc., and said bill of complaint in equity averred that appellant Francis A. Howard, during the year of 1915 and in the early part of the year 1916, that he discovered that tetraethyl lead when mixed in small quantities with any grade of gasoline, increased the efficiency of such gasoline when used as fuel for internal combustion engines, eliminated the knock in the motor and minimized the accumulation of carbon in the cylinders of the motor which occurred in the use of gasoline not so treated, and further discovered that tetraethyl lead when mixed with certain other chemicals or reagents in relatively certain quantities and under relatively certain conditions made a safe, efficient and cheap chemical compound, which, when added to any grade of gasoline, increased its efficiency when used as fuel for internal combustion engines, eliminated the knock in the motor and minimized the accumulation of carbon in the cylinders which attended the use as motor fuel of gasoline not so treated, and said complaint in equity further shows that said appellant Francis A. Howard wrote out a formula in conformity with his said discoveries and inventions, and in addition to tetraethyl lead, the chief active ingredient or reagent employed in accomplishing the beneficial results such as set forth herewith, said formula contained several other ingredients or reagents,

some of which were for the purpose of preventing precipitation, enabling the tetraethyl lead to act more efficiently and to bring about other beneficial results, some of which were intended to give low grade gasolines an increased explosive force, one of which was for the sole purpose of giving to the mixture of said chemical compounds and to gasoline impregnated with it, a distinctive color and some other ingredients were employed for the sole purpose of concealing the presence in said mixture of tetraethyl lead and other ingredients, without interfering with the effectiveness thereof and to render impossible a complete analysis of said mixture of chemical compounds composing said formula and to prevent anyone from ascertaining by analysis that it contained tetraethyl lead, and appellant Francis A. Howard, on or about the same time as aforesaid, during the years of 1915 and 1916, that appellant discovered and invented a process and method of mixing said chemical combination, which rendered said mixing and mixture safe to handle and use and aided the assimilation of the tetraethyl lead by the gasoline with which it was blended and made its reaction more potent in accomplishing the results herein described, and the said formula is a secret formula, and to the chemical compound made pursuant to it was given the name of "Vitigas" and under that name it was marketed and sold after being manufactured by complainant (appellant) for several years thereafter, and the Constitution of the United States is very explicit in its declaration for the protection of authors and inventors in relation to discoveries and in-

ventions and rights to respective writings and discoveries, as it reads as follows:

> ARTICLE I, Sec. 8, Cl. 8 (Copyrights and Patents). Congress shall have the power * * * To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries. (Const. U. S. A.)

And by the term "securing" an exclusive right is here intended, not the protection of an acknowledged legal right, but a future right:

> *Wheaton v. Peters,* 8 Pet. 591, 660 (1834).

And appellant wrote a formula which is a secret formula, which was written during the year of 1916, which at the time of writing said formula, it was an unpublished work, and under the Copyright Act of the United States of America it is provided:

> Title 17—Copyrights—Sec. 2. RIGHTS OF AUTHOR OR PROPRIETOR OF UNPUBLISHED WORK. Nothing in this title shall be construed to annul or limit the right of the author or proprietor of an unpublished work, at common law or in equity, to prevent the copying, publication, or use of such unpublished work without his consent, and to obtain damages therefor. (Mar. 4, 1909, c. 320, Sec. 2, 35 Stat. 1076.)

And under the provisions of the Copyright Act of the United States of America, it is further provided for the protection of appellant in his discoveries and inventions and the writing of aforesaid formula as written by appellant, and said protection to appellants reads as follows:

> Title 17—Copyrights—Sec. 23. DURATION; RENEWAL. The copyright secured by this title shall

endure for twenty-eight years from the date of first publication, whether the copyrighted work bears the author's true name or is published anonymously or under an assumed name: PROVIDED, That in the case of any posthumous work or of any periodical, cyclopedic, or other composite work upon which the copyright was originally secured by the proprietor thereof, or of any work copyrighted by a corporate body (otherwise than as assignee or licensee of the individual author) or by an employer for whom such work is made for hire, the proprietor of such copyright shall be entitled to a renewal and extension of the copyright in such work for the further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered therein within one year prior to the expiration of the original term of copyright; AND PROVIDED FURTHER, That in the case of any other copyrighted work, including a contribution by an individual author to a periodical or to a cyclopedic or other composite work when such contribution has been separately registered, the author of such work, if still living, or the widow, widower, or children of the author, if the author be not living, or if such author, widow, widower, or children be not living, then the author's executors, or in the absence of a will, his next of kin shall be entitled to a renewal and extension of the copyright in such work for a further term of twenty-eight years when application for such renewal and extension shall have been made to the copyright office and duly registered

therein within one year prior to the expiration of the original term of copyright; AND PROVIDED FURTHER, That in default of the registration of such application for renewal and extension, the copyright in any work shall determine at the expiration of twenty-eight years from first publication. (Mar. 4, 1909, c. 320, Sec. 23, 35 Stat. 1080.)

Authority for copyright in the United States exists as Congress has provided by legislation:

American Tobacco Co. v. Werckmeister, 207 U. S. 284 (1907).

And the power granted to Congress relative to copyright, "is domestic in its character and necessarily confined within the limits of the United States."

Brown v. Duchesne, 19 How. 183, 195 (1857).

And copyright is a species of property distinct from ownership of property used in making copies of the matter copyrighted and so held in the case of:

Stevens v. Gladding, 17 How. 447 (1855).

The bill of complaint in equity shows that the property and property rights of appellant was through the use of conspiracy and fraud unconstitutionally confiscated and that a part of the property and property rights was the aforesaid formula which is protected by the Copyright Act of the United States and the said authorities cited herewith.

Trademarks and Patents as Shown in Record.

On November 4, 1916, an application for registration of a trademark covering the use of the word "Vitigas" was filed in the United States Patent Office in the name of Howard-Vaughan Co., Inc., a corporation, and said trademark, numbered Serial No. 99086, was issued on April 24, 1917; and on November 25, 1916, appellant deposited in United States Patent Office for registration a label under the title of "Vitigas" a chemical compound for use in gasoline for purposes aforesaid, and said application was granted and issued by the United States Commissioner of Patents on February 13, 1917, to said corporation, numbered Serial No. 19885, and on all packages sold, a label was attached bearing a facsimile of said label registered in the United States Patent Office, so that the public could identify the goods and each package and container carried instructions thereon and said label was published as required by law, and on January 25, 1918, appellant filed an application in the office of Commissioner of Patents for Letters Patent of the United States on a "process for the Extraction of Gasoline and another Product from Kerosene," Serial No. 213,698, and said process patent was issued by the Commissioner of Patents on November 12, 1918, as United States Letters Patent No. 1,284,687, containing four claims; and said patent provided a means for recovering certain hydrocarbon distillates which were used as reagents in conjunction with and to further and expedite the assimilation of certain other ingredients and lead compounds which composed the aforesaid secret formula for "Vitigas," among said compounds in the said formula, tetraethyl lead was used in conjunction with other compounds and chemicals, which was well known by the defendant (appellee) Thomas

Midgley, Jr., that appellant was the discoverer and inventor of combining said chemical compounds with tetraethyl lead for the use in gasoline as hereinbefore set forth, and after the said Thomas Midgley, Jr., had fraudulently obtained said information, and for the purpose to confuse the issues, the said Thomas Midgely, Jr., applied for patents to the United States Patent Office on dates as follows, making claims as enumerated in each patent and in this fraudulent manner had patents issued as follows: January 7, 1918, he applied for patent which was granted as No. 1,296,832, issued March 11, 1919, in which said patent he made the principal claim which was for benzol blended with kerosene as an anti-knock preventer to be mixed with gasoline for use as a fuel for internal combustion engines; and on October 4, 1918, applied for another patent which was issued as No. 1,491,998, issued April 29th, 1924, in which said patent the principal claim was for benzine mixed with cyclohexane as a motor fuel; and on October 15th, 1920, another patent was applied for which was issued as No. 1,501,568, issued July 15, 1924. in which patent the principal claim was for aniline injection as an anti-knock resisting fluid; and on April 15th, 1922, filed an application for Letters Patent for what the said Thomas Midgley, Jr., wrongfully described as "Method and Means for Using Motor Fuels," for the first time set forth in the twenty-first claim, "A Fuel for Internal Combustion Engines Comprising Gasoline and Tetraethyl Lead," and patent thereon was issued to said Thomas Midgley, Jr., on February 23rd, 1926, as No. 1,573,846, and the said appellee Thomas Midgley, Jr., very well knew when he filed said application that appellant had in 1915 and 1916 discovered and invented the use of tetraethyl lead in gasoline and registered a trademark with Patent Office for purposes herein set forth,

and said Thomas Midgely, Jr., also knew that he was infringing on the trademark rights of appellant, and in filing his application for said patent and patents and executing the inventor's oath provided by law he further committed an infringement against the trademark rights and the discoveries and inventions of appellant, appellee has produced and sold appellant's rights all over the United States and thereby by fraud and perjury he unconstitutionally confiscated the property and property rights of appellant within a period of about two to eight years after appellant had made his discoveries and inventions, and said appellee has at all times since and does now continue the said unconstitutional confiscation of appellant's property and property rights without jurisdiction and without due process of law and thereby has at all times committed and does now commit and operate an infringement against the discoveries and inventions of appellant, by producing and selling said discoveries and inventions, and also against the rights granted to appellant under the trademark laws of the United States of America:

> Title 15—Commerce and Trade—Sec. 96. Evidence of ownership; infringement, and damages therefor. The registration of a trade mark under the provisions of this subdivision of this chapter shall be *prima facie* evidence of ownership. Any person who shall, without consent of the owner thereof, reproduce, counterfeit, copy, or colorably imitate any such trade mark and affix the same to merchandise of substantially the same descriptive properties as those set forth in the registration, or to labels, signs, prints, packages, wrappers, or receptacles intended to be used upon or in connection with the sale of merchandise of substantially the same descriptive properties as those set forth in such registration, and shall use,

or shall have used, such reproduction, counterfeit, copy or colorable imitation in commerce among the several States, or with a foreign nation, or with the Indian Tribes, shall be liable to an action for damages therefor at the suit of the owner thereof; and whenever in any such action a verdict is rendered for the plaintiff, the court may enter judgment therein for any sum above the amount found by the verdict as the actual damages, according to the circumstances of the case, not exceeding three times the amount of such verdict, together with the costs. (Feb. 20, 1905, c. 592, Sec. 16, 33 Stat. 728.)

And appellant is entitled to further protection against the fraud and infringement of said appellee against the trade mark rights of appellant, by the court issuing an injunction and the court may order a recovery and an assessment of damages against the said appellee in compensation for said infringement:

Title 15—Commerce and Trade—Sec. 99 (Feb. 20, 1905, c. 592, Sec. 19, 33 Stat. 72), Code of Laws of United States of America.

And the court may order the destruction of infringing labels; service of injunction, and proceedings for enforcement, and said appellee has caused through assignment, conspiracy and fraud in conjunction with others to have tetraethyl lead labels and signs on thousands of gasoline service station pumps all over the United States in each and every state of the Union, which is violation against the trade mark rights and patent rights of appellant:

Title 15—Commerce and Trade—Sec. 100 (Feb. 20, 1905, c. 592, Sec. 20, 33 Stat. 729; Mar. 3, 1911, c. 231, Sec. 291, 36 Stat. 1167), Code of Laws of the United States of America.

And the court may declare interfering registered trade marks void and grant relief against such interference:

> Title 15—Commerce and Trade—Sec. 102 (Feb. 20, 1905, c. 592, Sec. 22, 33 Stat. 729), Code of Laws of the United States of America.

And appellant for several years manufactured and sold his trade mark product, and at common law the exclusive right to it grows out of its use and not its mere adoption, and during the time that that said manufacturing and sales were being made by appellant, the said appellee Thomas Midgley, Jr., committed the aforesaid infringement; and the present law is based upon the commerce power:

> *Warner v. Searle & H. Co.*, 191 U. S. 195 (1903).

And the aforesaid patents procured by the said appellee Thomas Midgley, Jr., are an infringement against appellant's rights, and when an infringement of patent is committed the injured party is entitled to damages therefor:

> Title 35—Patents—Sec. 67 (R. S. Sec. 4919); from Act July 8, 1870, c. 230, Sec. 59, 16 Stat. 207, Code of Laws of the United States of America.

And appellant may bring an action and may maintain a suit in law or equity in above entitled court on the ground of inadvertence, accident and mistake, and there has been no wilful default or intent to defraud or mislead the public, on the part of appellant:

> Title 35—Patents—Sec. 71 (R. S. Sec. 4922); Act of July 8, 1870, c. 230, Sec. 60, 16 Stat. 207, Code of Laws of the United States of America.

Conspiracy and Fraud Alleged in Bill of Complaint in Equity.

Conspiracy and fraud is charged in the bill of complaint in equity against several defendants as named in the record, and a conspiracy to injure persons in exercise of civil rights is a violation of Federal law against the civil rights of appellant:

> Title 18, Chapter 3, Section 51; R. S. Sec. 5508 (Mar. 4, 1909, c. 321, Sec. 19, 35 Stat. 1092), Code of Laws of the United States of America.

Fraud is alleged in the bill of complaint in equity, and courts of equity have jurisdiction to relieve in all cases of fraud:

> *Tyler v. Savage,* 143 U. S. 79 (12 Sup. Ct. 340), 36 L. Ed. 82.

Formula Belonging to Appellant Is Unlawfully Held by The Howard-Vaughan Co., Inc., a Corporation, Defendant Herein.

The bill of complaint in equity alleges that on or about October 6, 1934, the directors of The Howard-Vaughan Co., Inc., a corporation, held a meeting at Niagara Falls, N. Y., and at said meeting a resolution was passed by the said board of directors wherein the aforesaid formula belonging to appellant was transferred, assigned and said transfer and assignment was accepted by the said board of directors with the understanding that it was done to aid making a sale of the entire business to a prospective purchaser, and that if the proposed sale failed to consummate, that the said formula would be returned to appellant, and the said sale did not consummate, and the said corporation has at all times and does now refuse to re-

turn and deliver or reassign said formula to appellant, therefore, said corporation is using said formula to fraudulently sell the said formula which is being fraudulently held by said corporation; and a court of equity will interfere to prevent the consummation of a fraud:

Adams v. Gillig, 199 N. Y. 314, 92 N. E. 670, 32 L. R. A. (N. S.) 127, 20 Ann. Cas. 910 (Aff. 131 App. Div. 194, 115 N. Y. S. 999).

And no matter what formal and proper proceedings surround a fraud, equity will disregard them all, if necessary, in order that justice and equity may prevail:

Wagg v. Herbert, 25 U. S. 546, 30 Sup. Ct. 218, 54 L. Ed. 321,

and fraud, indeed, in the sense of a court of equity, properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust, or confidence, which was justly reposed when the aforesaid formula was assigned to the aforesaid corporation, with the understanding that it would be reassigned if the proposed sale was not made, and the holding of said formula by the said corporation is injurious to appellant, and when an undue and unconscious advantage is taken of another such as has been done to appellant, courts of equity will not only interfere in such a case of fraud, but will also set aside all acts done, and they will also, if acts have by fraud been prevented from being done by the parties, equity will interfere and treat the case exactly as if the acts had been done:

Moore v. Crawford, 130 U. S. 122, 128, 9 Sup. Ct. 447, 32 L. Ed. 878, 880;

1 *Story Eq. Jur.,* Sec. 187.

The Answer of Answering Defendants.

Upon aforesaid foundation of fraud, in the answer of defendants E. H. Archer, The Howard-Vaughan Co., Inc., and James Westervelt to the bill of complaint in equity, the said defendants set up as a defense, setting forth that appellant filed an action in Chancery of New Jersey, numbered as case No. 120-704, in which appellant was the complainant, and the defendants herein, The Howard-Vaughan Co., Inc., and Thomas Midgley, Jr., among other defandants, whereas, if it had not been for the inadvertence and mistakes made in the pleadings of said action in the said Chancery of New Jersey in said case, and the facts of fraud had been properly presented to the said Chancery Court of New Jersey, it is most certain that the said Chancery Court of New Jersey would have ruled in favor of appellant instead of in favor of the said Howard-Vaughan Co., Inc., a corporation, because if any one even a layman read the aforesaid resolution passed by the directors of said corporation on October 6, 1934, and discussed same with appellant, they would readily see that the said resolution was a conspiracy and fraud from start to finish for the sole purpose of defrauding appellant of his formula and all the rights granted to appellant by the Federal Laws of the United States of America, therefore, the defense conducted in said case in Chancery Court of New Jersey, was founded and based upon the fraud perpetrated in said resolution of October 6, 1934, passed by the said Howard-Vaughan Co., Inc., and aided by the said defendant James Westervelt, and any action founded upon said resolution of October 6, 1934, as passed by the said Howard-Vaughan Co., Inc., a corporation, is and would be fraudulent, even to the extent of practicing fraud upon the court that would sit on any

hearing based upon such a foundation for an action in any court, and the answer sets forth that an action is now pending before the Chancery Court of New Jersey, case No. 122-229, wherein The Howard-Vaughan Co., Inc., a corporation, is the complainant and the Standard Oil Co. (New Jersey), Standard Oil Company of New Jersey, General Motors Corporation, E. I. DuPont de Nemours & Co., Inc., *et al.*, are the defendants, and this said action pending before the said Chancery Court of New Jersey is founded and based upon the said resolution of October 6, 1934, and since the said resolution is a fraud, the said action before the said Chancery Court of New Jersey is also a fraud by the said Howard-Vaughan Co., Inc., a corporation, as the said corporation have no jurisdiction before any court to prosecute an action based upon a fraudulent resolution such as the fraud committed in said resolution of October 6, 1934, and this is the sole foundation of said action now pending before the said Chancery Court of New Jersey, and therefore the whole presentation before said court is fraudulent, and any judgment thus rendered upon a false, fraudulent, and fictitious record, such as would be founded upon aforesaid resolution for title to the said formula, does not possess any verity in law or equity, and can always be assailed in an independent suit brought by any party interested who did not participate in the fraud, or have any knowledge of it until after the judgment was obtained and became final:

Holton v. Davis (C. C. A. 9), 108 Fed. 138, 149,

and allegations of fraud on information and belief are sufficient and it has been held that such allegations are sufficient for the court to consider said allegations:

Holton v. Davis, supra,

and the Supreme Court has held the "fact of being a party does not estop a person from relief against fraud, as it is generally parties to the action that are the victims of fraud:

Johnson v. Waters, 111 U. S. 640, 28 L. Ed. 547, 556,

and in the case of the judgment of the Chancery Court of New Jersey, rendered against appellant, such as mentioned in the answer of answering defendants, in the case of

Graver v. Faurot (C. C. A. 7), 76 Fed. 257,

the court had before it a bill to enjoin a decree in equity by a state court.

Graver brought a suit in equity in the Superior Court of Cook County, Illinois, against Faurot, alleging fraud, and a violation of confidential relationship in the sale of $15,000.00 of stock to him. All of the evidence was in the hands of the defendants. They filed an answer denying the charge of fraud. The court dismissed the bill upon this answer. It was afterwards discovered that the answer was false, whereupon this action was brought in the Federal Court to set aside the former decree. The lower court had dismissed the complaint, and the Circuit Court of Appeals in reversing it, said:

> "There was in this case no trial. The complainant having failed to reply, and the case being submitted under the statute of the state which made the answer conclusive proof, there was no conflict nor weighing

of evidence. A decree for the respondents went as a matter of course. There was practically a default on the part of the plaintiff, brought about by the false answers and affidavits. Technically the answers were evidence at the hearing but before the hearing they served the distinct purpose of denying to the plaintiff information which the respondents were under duty to furnish, and so of depriving him, before the test of trial, of his standing in court. That was an extrinsic, collateral fraud, distinct from and antecedent to the use of answers as evidence at the hearing."

Graver v. Faurot (C. C. A. 7), 76 Fed. 257, 262,

and the court after stating the apparent conflict between the parties in the cases as follows:

United States v. Throckmorton, 98 U. S. 61, 25 L. Ed. 93;

Marshall v. Holmes, 141 U. S. 589, 35 L. Ed. 870,

the court said:

"If there is here any inconsistency with the opinion in U. S. v. Throckmorton, to which reference was made, it was not the result of oversight, and ought perhaps to be regarded as an intentional modification of the earlier utterance. But whether there is conflict between the two opinions, or how they are to be reconciled, we need not consider. The present case, if we have properly interpreted the facts alleged, is distinguished from both, and rests upon an equity of which there can be no just denial. In reason and good conscience a decree obtained as this one is alleged to have been aught to be annulled. There can be no consideration of public policy or of private

right on which it ought to stand. There can be and ought to be no repose of society where for such wrongs the courts are incapable of giving redress. The decree of the circuit court is reversed and the cause remanded with direction to overrule the demurrer to the bill."

Graver v. Faurot (C. C. A. 7), 76 Fed. 257, 263,

and appellant herein is the legal, lawful and equitable owner of an action in the above entitled court against the defendants and each of them in the above entitled cause and action, which is based and founded upon the fraud perpetrated by the resolution aforesaid passed on October 6, 1934, by the aforesaid Howard-Vaughan Co., Inc., a corporation, and had the true facts been presented regarding all of the fraud surrounding the said resolution before the aforesaid Chancery Court of New Jersey, any and all actions before said court which were maintained and sustained by the said corporation, The Howard-Vaughan Co., Inc., said actions would have a ruling that the said corporation not only had no jurisdiction before said Chancery Court of New Jersey, but would have no jurisdiction before any court in the prosecution or defense of any action which was founded upon a resolution of the said corporation which was fraudulent, therefore the aforesaid cases are in point and answer the question before the above entitled court, and in a leading and outstanding case wherein a judgment was procured by fraud in a state court, where the parties to a successful judgment in the state court and in a suit in the Federal Court

were enjoined from taking advantage of their judgment rendered in the state; in the state court, the jury was deceived; the court was deceived; the witnesses, many of them, were deceived,—all by conspiracy and fraud, and the Federal Court before which the action was brought and submitted to the said tribunal and the truth of which was contested before it and passed upon by it, as the rule was stated in the case of

Hilton v. Guyot, 159 U. S. 113, 207, 40 L. Ed. 95, 123, 16 Sup. Ct. Rep. 139,

which governed the ruling in the case before the court upon which it ruled, as in the case of

C. R. I. & P. Ry. Co. v. Callicotte, 267 Fed. 799, 16 A. L. R. 386, 395, 396,

therefore, the order dismissing bill of complaint in Chancery of New Jersey, case No. 120-704, on account of the fraud under which said order and judgment was procured, it should be set aside and declared null and void, and the judgment in said case is void on its face, and a court has the power to set aside such a judgment at any time the subject is brought to its attention:

Marshall v. Holmes, 141 U. S. 589, 35 L. Ed. 870.

and where a fraudulent advantage has been taken, which has been done to appellant herein, a court of equity will protect appellant by setting the aforesaid judgment aside:

Colby v. Title Ins. & Trust Co., 160 Cal. 632, 641, 643.

Appellant Filed and Served Motion and Petition to Amend Bill of Complaint in Equity.

On January 9, 1940, appellant filed and served notice and a motion and petition to amend bill of complaint in equity, and appellant alleged in said petition to amend bill of complaint in equity, that on or about Wednesday, January 3rd, 1940, that he had discovered a new and gigantic fraud which was involved in the matter before the court, and the bill also named many fictitious named defendants whose true and correct names and addresses had been discovered, which the appellant had substituted in the place of the said fictitious named defendants, and had the proposed amended bill of complaint ready to file and serve, and the District Court below refused to allow appellant to file the proposed amended bill of complaint in equity and dismissed the action, denying leave to amend which is a denial of due process of law and is a reversible error:

Kendig v. Deane, 97 U. S. 423;
Rogers v. Penobscot Mix. Co., 154 Fed. 606.

Jurisdiction.

The Federal Courts have exclusive jurisdiction of all cases arising under the patent-right or copyright laws of the United States:

> Title 28—Judicial Code and Judiciary—Chap. 10, Sec. 371, Code of Laws of the United States of America.

And the Federal Court has jurisdiction of all suits at law or in equity arising under the patent, the copyright, and the trade mark laws:

> Title 28—Judicial Code and Judiciary—Chap. 2, Sec. 41, subd. (7); R. S. Sec. 629, par. 9 (Mar. 3, 1911, c. 231, Sec. 24, par. 7, 36 Stat. 1092), Code of Laws of the United States of America.

And the Federal Court has jurisdiction for any violation of the provisions of the copyright laws to enter a judgment or decree enforcing the remedies provided under said laws:

> Title 17—Copyrights—Sec. 26 (Mar. 4, 1909, c. 320, Sec. 26, 35 Stat. 1082), Code of Laws of the United States of America.

The jurisdiction of Federal Courts in equity cannot be defeated or impaired by state statutes providing exclusive methods for settling estates, or undertaking to give exclusive jurisdiction to state courts:

> *Waterman v. Canal-Louisiana Bank Co.,* 215 U. S. 33, 30 Sup. Ct. 10, 54 L. Ed. 80;
>
> *Hayes v. Pratt,* 147 U. S. 557, 13 Sup. Ct. 503, 37 L. Ed. 279.

An adequate remedy at law created by state statutes and available in state courts cannot oust the Federal Courts of jurisdiction in equity:

> *Smith v. Reeves,* 178 U. S. 436, 20 Sup. Ct. 919, 44 L. Ed. 1140;
>
> *Smyth v. Ames,* 169 U. S. 466, 18 Sup. Ct. 418, 42 L. Ed. 819.

A court of equity has jurisdiction to protect property, even though in complying with the decree of the court to perform acts beyond the jurisdiction of the court:

> *Massie v. Watts,* 6 Cranch. 148, 157, 3 L. Ed. 181.

A court of equity concerns itself only in the protection of property rights and treats any civil right of a pecuniary nature as a property right:

In re Sawyer, 124 U. S. 200, 210, 8 Sup. Ct. 482, 31 L. Ed. 402.

It is the privilege and duty of a court of equity to supply the defect and furnish the remedy:

Morgan v. Beloit, 7 Wall. 614.

And equity may apply its own rule in all equity cases:

Kirby v. L. S. & M. S. Ry. Co., 120 U. S. 130, 7 Sup. Ct. 430, 30 L. Ed. 569.

The foregoing and above entitled cause on appeal is based and founded upon the Constitution, Federal Laws, Rights, Privileges and Immunities granted by the Constitution and Federal Laws of the United States, and if the legislatures and the courts of the several states may at will annul the judgments of the courts of the United States, supported by the Constitution of the United States, and destroy the rights acquired under those judgments, the Constitution itself becomes a solemn mockery; and the nation is deprived of the means of enforcing its laws by the instrumentality of its own tribunals. So fatal a result must be depreciated by all; and the people of one state not less than the citizens of every other state, must feel a deep interest in resisting principles as destructive of the United States and its Constitution, and averting consequences as fatal to themselves; it was so held in the case of

United States v. Judge Peters (Cranch. 5), U. S. Reps. 9, p. 136.

Judgment of Dismissal.

The judgment of dismissal of the District Court below [Tr. of Record, pp. 66-68] in ordering, adjudging and decreeing that no cause of action cognizable in said or in any court of the court of the United States is set forth in bill of complaint, is erroneous upon the ground that the said bill in equity sets forth a federal question over which federal courts only have jurisdiction, relative to infringement involving copyright, patent and trade mark laws, and said bill sets forth conspiracy and fraud, which constitutes an action cognizable in the Federal Courts of the United States; the Federal Courts have jurisdiction of all suits at law or in equity arising under the patent, the copyright, and the trade mark laws:

> Title 28—Judicial Code and Judiciary—Chap. 2, Sec. 41, subd. (7); R. S. Sec. 629, par. 9 (Mar. 3, 1911, c. 231, Sec. 24, par. 7, 36 Stat. 1092), Code of Laws of the United States of America.

And allegations of fraud could have been considered and held sufficient in the hearing before the District Court below:

> *Holton v. Davis* (C. C. A. 9), 108 Fed. 138, 149.

The District Court below adjudging that no diversity of citizenship between the parties exists as a ground for judgment of dismissal is erroneous; when a federal question such as in the case hereof, the jurisdiction is governed by the federal laws and statutes heretofore cited relating to federal questions arising under the patent, the copyright, and the trade mark laws.

The District Court below adjudging that bill of complaint in equity is barred by a previous adjudication of

the Court of Chancery of New Jersey in action No. 120-704 in said court is erroneous because the bill of complaint in equity in above action hereof alleges that the said action No. 120-704 in the Court of Chancery of New Jersey was founded and based upon fraud, which is more fully set forth heretofore, and a judgment of a state court which is founded upon fraud, in a leading case the parties were enjoined from taking advantage of their successful judgment in a state court wherein the successful party had misrepresented the true facts to the court as has been done in the said case before the said Chancery of New Jersey, which is sufficient to undermine the judgment:

Chicago, Rock Island & Pacific Railway v. Callicotte (C. C. A. 8), 267 Fed. 799, 16 A. L. R. 386.

The District Court below adjudging that it would be and will be impossible for complainant to frame an amended bill of complaint based on said cause of action herein, is erroneous because the bill in equity sets forth federal questions relating to patent, copyright and trade mark laws and infringements against appellant's rights under said laws, and where an infringement is committed the injured party is entitled to damages:

Title 35—Patents—Sec. 67; R. S. Sec. 4919; Act of July 8, 1870, c. 230, Sec. 59, 16 Stat. 207.

The District Court in dismissing the bill of complaint in equity without leave to amend is erroneous and is a denial of due process of law, and is a reversible error:

Kendig v. Deane, 97 U. S. 423;

Rogers v. Penobscot Mix. Co., 154 Fed. 606.

The District Court below in adjudging that the defendants have and recover from the complainant their costs herein to be taxed. Costs taxed at $30.50, is erroneous, because the court after dismissing the bill on the grounds of no jurisdiction, the said court would not have any power or jurisdiction to render a judgment for costs in favor of the defendants.

Assignment of Errors.

The assignment of errors [Tr. of Record, pp. 70-71, pars. I, II, III, IV, V, VI] reading as follows:

I.

The court erred, in dismissing bill of complaint in equity, upon the ground, that no cause of action cognizable in above entitled court or in any court of the United States, as set forth in the making, filing and entering of the judgment made and entered on January 17, 1940.

II.

The court erred, in dismissing bill of complaint in equity, upon the ground, that no diversity of citizenship between the parties exists which would give the court or any court of the United States jurisdiction, as made and entered in the judgment on January 17, 1940.

III.

The court erred, in dismissing the bill of complaint in equity, upon the ground, that the cause of action attempted to be set forth in the bill of complaint is barred by a previous adjudication of the Court of Chancery of New Jersey in action No. 120-704 in said court, as made and entered in the judgment on January 17, 1940.

IV.

The court erred, in dismissing bill of complaint in equity, upon the ground, that it would be impossible for complainant to frame an amended bill of complaint based upon said cause of action, as made and entered in the judgment on January 17, 1940.

V.

The court erred, in dismissing bill of complaint in equity, in denying leave to amend and to file proposed amended bill of complaint in equity, in making and entering the judgment on January 17, 1940, that said complaint be dismissed without leave to amend.

VI.

The court erred, in ruling no jurisdiction, and then holding that said defendants as mentioned in the aforesaid judgment on January 17, 1940, that said defendants have and recover from complainant their costs herein to be taxed.

Summary of Assignment of Errors.

The assignment of errors under paragraph I of said assignment shows that the District Court below dismissed the bill of complaint in equity, upon the ground, that no cause of action cognizable in the above court or any court of the United States jurisdiction, as made and entered in the judgment on January 17, 1940, and the said complaint shows that the controversy involved in the above entitled is a federal question over an infringement under the Constitution of the United States, the copyright, patent and trade mark laws of the United States of America, and the discoveries and inventions of appellant, which said federal

question is a matter of federal jurisdiction under said laws:

Const. U. S. A., Art. I, Sec. 8, Cl. 8,

and the Federal Courts have jurisdiction of all suits at law or in equity arising under the patent, the copyright, and the trade mark laws:

Title 28, Judicial Code and Judiciary, Chap. 2, Sec. 41, sub. (7); R. S. Sec. 629, par 9 (Mar. 3, 1911, c. 231, Sec. 24, par. 7, 36 Stat. 1092), Code of Laws of the United States of America.

Under paragraph II of said assignment of errors, it shows that the court dismissed the bill of complaint in equity, upon the ground, that no diversity of citizenship between the parties exists which would give the court or any court of the United States jurisdiction: it is a well established fact and law, that when a federal question is involved relative to patents, copyrights and trade marks, that the jurisdiction rest with Federal Courts; and diversity of citizenship is not necessary:

Title 28, Judicial Code and Judiciary, Chap. 2, Sec. 41, subd. (7),

and the said federal law declares the extent of the judicial power of the United States Courts and which declare the supremacy of the authority of the National Government within the limits of the Constitution and Federal Laws as part of its general authority and the power to give effect to the judgments of the Courts of the United States which is coextensive with its territorial jurisdiction:

Atchison etc. R. Co. v. Sowers, 213 U. S. 55.

Under paragraph III of said assignment of errors, the court dismissed the bill of complaint in equity upon the ground that the cause of action attempted to be set forth in said complaint is barred by a previous action of the Court of Chancery of New Jersey in action No. 120-704 of said court, and the said complaint sets forth that the judgment of said court of New Jersey was procured from said court upon fraudulent representations to said court, therefore the said judgment having been procured by false testimony founded upon a fraudulent resolution of aforesaid Howard-Vaughan Co., Inc., a corporation, which is sufficient to undermine the said judgment, and such judgments of state courts have been enjoined and set aside in the Federal Courts:

> *Chicago, Rock Island & Pacific Railway v. Callicotte* (C. C. A. 8), 267 Fed. 799, 16 A. L. R. 386,

and allegations of fraud in a bill have been considered sufficient for a hearing before the District Court of the United States:

> *Holton v. Davis* (C. C. A. 9), 108 Fed. 138, 149.

And courts of equity have jurisdiction to relieve in all cases of fraud and the said complaint alleges fraud:

> *Tyler v. Savage,* 143 U. S. 79, 12 Sup. Ct. 340, 36 L. Ed. 82.

And the jurisdiction of Federal Courts is independent of that conferred upon State Courts:

> *Borer v. Chapman,* 119 U. S. 587, 7 Sup. Ct. 342, 30 L. Ed. 532.

Under paragraph IV of said assignment of errors, bill is dismissed upon the ground that it would be impossible for complainant to frame an amended bill of complaint based upon said action, and the bill shows that the controversy in said bill is a matter involving the discoveries and inventions of appellant, wherein appellant claims an infringement against his rights under the Constitution and Federal Laws, therefore, it is most possible that an amendment could be framed and the fictitious named defendants brought in as parties to the action, and also the parties involved in the gigantic fraud alleged to be discovered on January 3, 1940, after the said bill was filed in the District Court below, all of which involve an important federal question and therefore is of federal jurisdiction; and courts are not at liberty to decide a cause contrary to the provisions of the Constitution of the United States:

> *Cooley's Constitutional Limitations,* and cases cited (p. 159 *et seq.*),

and the Constitution of the United States is the fundamental law in opposition to which any order or law must be inoperative:

> *Cooley's Constitutional Limitations,* 4th Ed. 56 (*45).

The assignment of errors, under paragraph V, shows that the court dismissed the bill and denied leave to file proposed amended bill of complaint, which is a denial of due process of law and a reversible error; and such rul-

ing have been reversed and the cause remanded with directions for further proceedings in conformity with the opinion:

United States v. Lehigh Valley R. R. Co., 220 U. S. 287.

Under paragraph VI of said assignment of errors, the court ruling no jurisdiction and dismissing the bill, then holding that defendants as mentioned in the aforesaid judgment on January 17, 1940, have and recover their taxing costs, it is most certain that if the court ruled it had no jurisdiction, that the said court would not have any jurisdiction to render a judgment for taxing costs in favor of defendants against appellant; the court was disqualified to render said judgment and said taxing cost judgment is void:

Deming v. McClaughry (C. C. A. 8), 113 Fed. 639, 651;

and the same principle reaffirmed in

McClaughry v. Deming, 186 U. S. 49, 46 L. Ed. 1049.

Statement of Points.

The statement of points [Tr. of Record, pp. 74-76] are made a part hereof just the same as if repeated in this brief hereof word for word as they read in the transcript of record hereof, and are supported by the foregoing points and authorities contained in this brief in its entirety hereof.

Designation of Record on Appeal.

The designation of record on appeal [Tr. of Record, pp. 76-77] upon which appellant relies upon on appeal hereof, are made a part hereof just the same as if repeated in this brief hereof word for word as they read in the transcript of record hereof, and are supported by the foregoing points and authorities contained in this brief in its entirety hereof.

Conclusion.

Wherefore, appellant respectfully submits the record, brief and all papers hereof, and prays that the judgment of the District Court below be reversed and that the matter be remanded to the District Court for further proceedings with the filing of the amended bill of complaint in equity.

Dated: Los Angeles, California, April 30, 1940.

Respectfully submitted,

CALVIN S. MAUK,

Solicitor for Appellant.